

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
In the Matter of Protest of:)
Green's Travel Coach)
Francis Marion University)
BVB No. BVB-2022 & RFP No. 2036)
Transportation for Athletic Teams)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

CASE No. 2009 - 138

POSTING DATE:

December 11, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Green's Travel Coach (Green's). First with best value bid (BVB) No. BVB-2022 and then with request for proposals (RFP) No. RFP-2036, Francis Marion University (FMU) has attempted to procure motor coach transportation services for its athletic teams. Green's protested FMU's intent to award BVB – 2022 to Lancaster Tours (Lancaster) alleging “our bid was the lowest bid” and “I was told (by FMU) that Lancaster was a larger company that could provide more coaches and more drivers.” After hearing arguments on August 27, 2009, the CPO ruled on that matter on September 8, 2009. [CPO's Case # 2009 – 129] In that decision, citing “numerous statutory violations in the determination of award by FMU” of BVB -2022, the CPO concluded, “For all the reasons stated above, the protest is granted. The procurement is remanded back to FMU for a proper determination of award, or better, a resolicitation.” [Copy of CPO Decision No. 2009-129 with Green's original letter of protest attached] FMU proceeded by resoliciting for the transportation services using RFP–2036. FMU also entered into an emergency procurement with Lancaster, the incumbent contractor, for the fall semester so that its athletic teams could make their scheduled fall games. Green's protested FMU's cancellation of BVB–2022, the emergency procurement, and RFP – 2036 alleging:

1. Francis Marion University's failure to award solicitation BVB-2002 (2022) to Greens Travel Coach, LLC as the highest rated responsive and responsible offeror as is required by the SC Procurement Code.
2. Francis Marion University's cancellation of solicitation BVB-2002 (2022) in violation of the terms of the SC Procurement Code;
3. Francis Marion University's issuance of Request for Proposals RFP-2036 in violation of the terms of the SC Procurement Code;
4. Even if issuance of RFP-2036 is authorized under the Code, the terms of RFP-2036 violate the SC Procurement Code;
5. Francis Marion University's awarding the fall Charter Bus Services to Lancaster after the CPO vacated the award of BVB-2022 to Lancaster is in violation of the SC Procurement Code;

In order to resolve this new matter, the CPO conducted a hearing December 1, 2009. Appearing before the CPO were Green's, represented by Eric Laquiere, Esquire; Lancaster, represented by Frankie Sistare; and FMU, represented by Elizabeth Crum, Esquire, and Susie Shannon, Esquire.

NATURE OF PROTEST

The current letter of protest is attached and incorporated herein by reference. Also attached are Green's first letter of protest, the CPO's decision in case # 2009-129 and a motion by FMU to dismiss the protest.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 20, 2009, FMU issued the BVB. [Ex. 1 of the original record]
2. On August 3, 2009, FMU opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Green's	\$61,096
Lancaster	81,512

Travel Tours Unlimited 91,307
[Ex. 9 from the original protest file]

3. On August 4, 2009, FMU posted a notice of intent to award to Lancaster “Not to exceed \$250,000.” [Ex. 4 from the original protest file]
4. On August 10, 2009, Green’s protested to the CPO.
5. On August 23, 2009, FMU declared an emergency procurement to Lancaster. [Ex. 1]
6. On August 27, 2009, the CPO conducted a hearing for Case No. 2009-129.
7. On September 8, 2009, the CPO issued Decision No. 2009-129.
8. On September 9, 2009, FMU issued RFP No. RFP-2036 for the same transportation services. [Ex. 2]
9. On September 22, 2009, FMU amended RFP–2036 by issuing Amendment No. 1. [Ex. 3]
10. On September 22, 2009, FMU amended RFP–2036 again by issuing Amendment No. 2. [Ex. 4]
11. On October 2, 2009, Green’s filed this protest.
12. On October 5, 2009, FMU suspended RFP–2036 due to the protest. [Ex. 5]
13. On December 1, 2009, after continuing the hearing once due to a request from FMU, the CPO conducted a hearing in this matter.

MOTION TO DISMISS

FMU filed a motion (copy attached) asking the CPO to dismiss all issues of the protest. [See attached copy] After considering arguments on the motions to dismiss, the CPO denied all motions and proceeded with the hearing.

The motions to dismiss are addressed individually as follows:

Protest Issue No. 1 - Francis Marion University’s failure to award solicitation BVB-2022 to Greens Travel Coach, LLC as the highest rated responsive and responsible offeror as is required by the SC Procurement Code.

Green's argued in its letter, "Citing multiple bases for his decision, the CPO vacated the award to Lancaster Tours. One such basis was that Francis Marion University (FMU) made a mathematical error in calculating its rankings and that Greens Travel Coach was actually the highest rated offeror. Following this decision, the Code requires that FMU evaluate the highest rated offeror, i.e. Greens Travel Coach, for responsiveness and responsibility, and award the contract to Greens if it meets those standards."

FMU argued that this allegation should be dismissed as Green's did not timely appeal CPO decision 2009-129 to the Procurement Review Panel and this matter was previously decided by the CPO.

The CPO disagrees. In Decision 2009-129, the CPO wrote, "For all the reasons stated above, the protest is granted. The award to Lancaster is vacated. The procurement is remanded back to FMU for a proper determination of award, or better, a resolicitation." [Emphasis added] Given this order, FMU had two options: cancel the original solicitation in accordance with the law, or proceed with the original solicitation. The second option had two possible results. FMU could either find Green's was responsible and responsible, and thus entitled to award, or find Green's either non-responsive or non-responsible, or both. Of course, a finding of non-responsiveness or non-responsibility could be protested, as Green's attempts to do here. However, FMU must first make a decision. Accordingly, Green's protest is not ripe, to the extent it complains that it was improperly denied the award because it was determined non-responsive or non-responsible. As far as the CPO can tell, those decisions were not made. However, FMU's decision not to award to Green's, but to cancel the original solicitation and issue a new one, is a matter ripe for protest today.

Protest Issue No. 2 - Francis Marion University's cancellation of solicitation BVB-2022 in violation of the terms of the SC Procurement Code;

Green's argued in its letter, "FMU never cancelled solicitation BVB-2022 pursuant to the procedures required by the SC Procurement Code. Instead, FMU simply left the procurement stagnant and issued a new RFP for the same services, RFP-2036. This re-solicitation constitutes constructive cancellation of the original procurement, BVB-2022; which was done in contravention of the requirements of the SC Procurement Code. Thus, the cancellation is ineffective."

FMU argued that this matter should be dismissed as Green's did not timely appeal CPO decision 2009-129 to the Procurement Review Panel, that Green's failed to state a protest upon which relief may be granted, and that this matter was previously decided by CPO.

The CPO disagrees. In CPO Decision 2009-129, the CPO remanded the matter to FMU to make a decision to either award the contract to Green's (the only bidder other than Lancaster), or better, to re-solicit. The CPO's Decision gave FMU the choice to either to make a proper determination of award (to Green's) or, *even better*, to resolicit the services. The CPO did not cancel FMU's BVB-2022, but rather left it to FMU to comply with the decision. However, instead of complying with the decision, FMU proceeded with a new solicitation for the same services, but as of the date of the hearing, never cancelled the previous solicitation.

Protest Issue No. 3 - Francis Marion University's issuance of Request for Proposals RFP-2036 in violation of the terms of the SC Procurement Code;

Green's argued in its letter, "FMU's issuance of RFP-2036 is in violation of the terms of the Procurement Code in that, among other things, BVB-2022 (procuring the same services) was never cancelled or was cancelled in violation of the requirements of the Code."

FMU argued that this allegation should be dismissed as Green's did not timely appeal CPO Decision 2009-129 to the Procurement Review Panel, that Green's failed to state a protest upon which relief may be granted, that the protest was overly vague, and that the protest was previously decided by the CPO.

The CPO disagrees. The CPO did not order a re-solicitation, which Green's might have appealed, but rather remanded the matter to FMU to decide its next step. Green's was not overly vague in its allegation. Clearly, Green's protested FMU's re-solicitation in that FMU never announced its decision in BVB-2022 contrary to the CPO's directive.

Protest Issue No. 4 - Even if issuance of RFP-2036 is authorized under the Code, the terms of RFP-2036 violate the SC Procurement Code;

Green's argued in its letter, "The specifics of FMU's re-bid of bus charter services violates the Code. FMU's written determinations do not meet Code requirements, its weighting of bid considerations are arbitrary if not outright fraudulent, and the entire solicitation is organized in such a manner as to completely avoid the requirements, purposes, and policies of the Code and simply award the contract for services to Lancaster, at the expense of a 25% increase in cost to taxpayers."

FMU argued that this allegation should be dismissed as Green's failed to state a protest upon which relief may be granted and the allegation was overly vague or broad.

The CPO disagrees. In fact, with this allegation, Green's clearly protests FMU's new solicitation, FMU's decision to process it as an RFP, and FMU's evaluation criteria. Relief is certainly possible.

Protest Issue No. 5 - Francis Marion University's awarding the fall Charter Bus Services to Lancaster after the CPO vacated the award of BVB-2022 to Lancaster is in violation of the SC Procurement Code.

Green's argued in its letter, "After the CPO issued its decision vacating the award to Lancaster; FMU has awarded all of the bus charter services to date to Lancaster, piecemeal. This is in direct contradiction of the September 8, 2009 decision of the CPO, is in derogation of the rights of Greens Travel Coach as the successful protestor, and is an unlawful waste of taxpayer funds. FMU did not satisfy the requirements of the Code with respect to an "emergency procurement" for these services, nor did FMU follow the unappealed decision of the CPO. As a result, these contracts are in violation of the law.

FMU argued that this allegation should be dismissed as Green's did not timely appeal CPO Decision 2009-129 to the Procurement Review Panel, Green's failed to state a protest upon which relief can be granted, Green's was overly vague or broad, and the matter was previously decided by the CPO.

The CPO disagrees. Clearly, CPO Decision 2009-129 did not address the emergency procurement by FMU. Regarding timeliness of Green's protest of the emergency procurement, FMU challenged the timeliness of Green's protested arguing that FMU declared the emergency procurement on August 23, 2009, but Green's did not file this protest with the CPO until October 2, 2009.

Regarding the timeliness of green's protest of FMU's emergency procurement, FMU raises an interesting question. The Code authorizes protests of emergency procurements. In fact, the Procurement Review Panel has considered protests of emergency procurements in the past. Most infamous of the emergency procurements considered by the Panel was the procurement for the renovation of the State House. [Appeal of Morganti National Inc., Procurement Review Panel case No.

1995-10] The Code provides actual bidders the right to protest an award. It reads, “Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code.” [11-35-4210(1)(b)] [Emphasis added] However, unlike an invitation for bids, best value bid, fixed price bid, or request for proposals, the Code does not explicitly require posting of award or intent to award. In this emergency procurement, FMU posted no notice of award for its emergency procurement. Further, FMU sought no competition for its emergency procurement so there were no actual bidders who knew about the procurement.

The CPO concludes that some manner of notice is required before the protest clock begins. No evidence was provided that any notice was given. In the absence of any notice, how could bidders be expected to protest an act unseen, unheard, or unannounced by the State? It would be inconsistent with the Code provision of protest rights, as well as the Code’s stated purpose “(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement” to conclude otherwise. Such a conclusion would effectively insulate emergency and sole source procurements from any protest.

CONCLUSIONS OF LAW

Protest Issue No. 1 - Francis Marion University’s failure to award solicitation BVB-2002 (2022) to Greens Travel Coach, LLC as the highest rated responsive and responsible offeror as is required by the SC Procurement Code.

Green’s argued in its letter, “Citing multiple bases for his decision, the CPO vacated the award to Lancaster Tours. One such basis was that Francis Marion University (FMU) made a mathematical

error in calculating its rankings and that Greens Travel Coach was actually the highest rated offeror. Following this decision, the Code requires that FMU evaluate the highest rated offeror, i.e. Greens Travel Coach, for responsiveness and responsibility, and award the contract to Greens if it meets those standards.”

FMU argued that this matter is an attempt to reargue CPO Protest Case 2009-129 previously determined by the CPO.

The CPO disagrees. The CPO has not received any evidence or justification from FMU regarding a rejection of Green’s offers or a determination of Green’s responsiveness or responsibility. Without announcement, FMU silently refused to issue an award to Green’s for BVB-2022. Neither Green’s responsiveness nor responsibility was at issue during Case No. 2009-129. Therefore, the CPO received no information to evidence Green’s responsiveness or responsibility upon which to make a determination. CPO decision 2009-129 did note that FMU erred in its calculation of the evaluator’s scores and that if FMU had calculated the scores correctly that Green’s would have been the highest ranked. However, as neither the question of Green’s responsiveness or Green’s responsibility was before the CPO in that matter, the CPO made no such determination, the CPO remanded the matter to FMU.

To the CPO’s knowledge, to this day, FMU has announced no determination of the highest rated responsive and responsible offeror for BVB-2022. Instead, FMU followed the CPO’s clear preference that the solicitation be rebid due to violations of law by FMU that prevented any award of BVB-2022 in conformance with the Code.

Protest Issue No. 2 - Francis Marion University’s cancellation of solicitation BVB-2002 (2022) in violation of the terms of the SC Procurement Code;

Green's argued in its letter, "FMU never cancelled solicitation BVB-2022 pursuant to the procedures required by the SC Procurement Code. Instead, FMU simply left the procurement stagnant and issued a new RFP for the same services, RFP-2036. This re-solicitation constitutes constructive cancellation of the original procurement, BVB-2002; which was done in contravention of the requirements of the SC Procurement Code. Thus, the cancellation is ineffective."

Again, FMU contends that Green's is attempting to reargue Case no. 2009-129.

The CPO disagrees. The CPO believes it is incumbent upon the State to announce a conclusion of every solicitation, even one not awarded. In this case, with the decision remanded to FMU by the CPO, announcement of closure in the matter of BVB-2022 was imperative. However, FMU chose to remain silent about its decision to make no award. Green's awaited word of FMU's remanded decision, but FMU never posted a decision in BVB-2022 in violation of the regulations which required a written determination for cancellation of a solicitation after opening. [19-445.2065]

Protest Issue No. 3 - Francis Marion University's issuance of Request for Proposals RFP-2036 in violation of the terms of the SC Procurement Code;

Green's argued in its letter, "FMU's issuance of RFP-2036 is in violation of the terms of the Procurement Code in that, among other things, BVB-2022 (procuring the same services) was never cancelled or was cancelled in violation of the requirements of the Code."

Again, FMU contends that Green's is attempting to reargue Case no. 2009-129. The CPO disagrees with that assertion. In Decision 2009-129, the CPO ordered that FMU re-award or cancel the first solicitation. FMU has done neither. Instead, FMU issued another solicitation. FMU cannot merely resolicit absent a cancellation of the first solicitation.

Protest Issue No. 4 - Even if issuance of RFP-2036 is authorized under the Code, the terms of RFP-2036 violate the SC Procurement Code;

Green's argued in its letter, "The specifics of FMU's re-bid of bus charter services violates the Code. FMU's written determinations do not meet Code requirements, its weighting of bid considerations are arbitrary if not outright fraudulent, and the entire solicitation is organized in such a manner as to completely avoid the requirements, purposes, and policies of the Code and simply award the contract for services to Lancaster, at the expense of a 25% increase in cost to taxpayers."

FMU re-solicited the requirement for athletic team transportation as a request for proposals. The Code requires "Unless otherwise provided by law, all state contracts must be awarded by competitive sealed bidding, pursuant to Section 11-35-1520." [11-35-1510] The code requires further, "Contracts greater than fifty thousand dollars must be awarded by competitive sealed bidding except as otherwise provided in Section 11-35-1510." [11-35-1520(1)] The Code does allow other source selection methods to be used, including a request for proposals, provided "If a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520." [11-35-1530(1)] Inherent in the requirement for a written determination justifying the use of a request for proposal is that the written determination is legally sufficient to justify why an invitation for bids is either not practicable or not advantageous to the State.

FMU prepared a determination to justify its use of an RFP. FMU wrote, in part:

In selecting a contractor to provide transportation for the athletics Department, it has been determined that factors other than price such as company capabilities and demonstrated abilities are critical to the award . . . In order to select the best solution to provide transportation for the Athletic Department, it has been determined that factors other than price such as company capabilities and demonstrated abilities are critical to the award . . . The RFP is declaring the State's problem(s) and the RFP is requesting the business community to provide their solution . . .

Evaluation and weighting factors which will be used to evaluate the proposals:

1. Detail the information by function (i.e. the number of drivers. Mechanics, administrative, support personnel . . .
2. List the number of 42 passenger buses available to service this contract and the manufacture date. (No older than 5 years)
3. The number of drivers that have license CDL-Class B license (Please submit copy of each driver that will drive for FMU)
4. Six years or more of experience in the following area:
 - Drivers
 - Transportation of athletics teams
 - Insurance coverage (6 years without a break in service)
5. Submit our company procedures for the following:
 - Breakdowns
 - Bad weather
 - Emergency situations

However, in the actual RFP, FMU used as its evaluation factors:

- Offeror's Plan for providing services. This evaluation will consider the overall plan for providing services and also contingency for breakdowns, bad weather, and emergency situations. (30%)
- Experience, references, and safety history. (20%)
- Appropriateness of company policies related to drivers and maintenance. (20%)
- Total Bid Amount (15%)

In the first solicitation, which was processed by FMU as a best value bid, FMU used the following evaluation factors:

- "PRICING IS VALUED AT 60% OF AWARD." [Ex. 1, p. 5, Requirement] [Emphasis theirs]
- Best Value Bid Award Criteria
 - Give a brief overview of your company, date of incorporation, and number of employees at the facility that would service this account.
 - Please break out that number by function (i.e. drivers, mechanics, administrative, support personnel).
 - List the number of 42 passenger buses in your fleet that would be available to service this contract and the date of their manufacture.
 - List your USDOT certification number.
 - List the number of full time vs. part time drivers you employ.
 - Submit any other information that you believe would demonstrate that your company would be the best choice to provide this service to the university.

- YOUR RESPONSES TO THE QUESTIONS ABOVE WILL BE EVALUATED BY UNIVERSITY PERSONNEL AS 40% OF THE AWARD CRITERIA.
- [Ex. 1, p. 6]

In the evaluation factors used for the RFP, FMU's use of factors such as the number of drivers, mechanics, administrative, support personnel, the number of 42 passenger buses available to service this contract and the number of drivers that have license CDL-Class B, all of which may be relevant to a determination of a bidder's capability of completing the required services satisfactorily, but hardly seem essential to selecting a contractor capable of performing transportation services for FMU athletic teams when 25 trips that only require one bus and 10 trips that only require two buses. Green's has alleged previously and currently that FMU is attempting to prevent smaller South Carolina companies from receiving its athletic team transportation business. The selected evaluation criteria such as a minimum of six years experience seem directed to do exactly that.

Protest Issue No. 5 - Francis Marion University's awarding the fall Charter Bus Services to Lancaster after the CPO vacated the award of BVB-2022 to Lancaster is in violation of the SC Procurement Code.

Green's argued in its letter, "After the CPO issued its decision vacating the award to Lancaster; FMU has awarded all of the bus charter services to date to Lancaster, piecemeal. This is in direct contradiction of the September 8, 2009 decision of the CPO, is in derogation of the rights of Greens Travel Coach as the successful protestor, and is an unlawful waste of taxpayer funds. FMU did not satisfy the requirements of the Code with respect to an "emergency procurement" for these services, nor did FMU follow the unappealed decision of the CPO. As a result, these contracts are in violation of the law."

Faced with the original protest and the automatic stay imposed by the Code, FMU declared an emergency procurement for the provision of transportation services. John Kispert, Vice President – Business Affairs, wrote “The basis for selection of this particular vendor is: Francis Marion University is issuing an emergency procurement during the protest of BVB-2022. An emergency hearing is scheduled for Tuesday, August 27, 2009 at 9:00am. The current vendor has agreed to be content with the contract for three months. This emergency procurement is due to the fact that the Francis Marion University athletic teams are to start to travel on August 27, 2009.” [Ex. 1]

The Code allows authorized officials of governmental bodies, such as Mr. Kispert, to declare emergencies. It reads, “the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.”

The supporting regulations provide insight into the General Assembly’s intent. They read:

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a purchasing agency or a designee of either office. The existence of such conditions must create an immediate and serious need for supplies, services, information technology, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- (1) the functioning of State government;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

[19-445.2110(B)] [Emphasis added]

Considering that duration of the normal hearing process, the CPO questions why the need for transportation services could not have been met through normal procurement procedures, such as the small purchase process.

The regulations provide further, “Emergency procurement shall be limited to those supplies, services, information technology, or construction items necessary to meet the emergency.” The CPO questions why FMU felt the duration of the emergency had to be three months.

Regarding solicitations of competition under an emergency procurement, the Code requires “that such emergency procurements shall be made with as much competition as is practicable under the circumstances regulations require.” Yet, FMU sought no competition at all; choosing instead to award to Lancaster, the incumbent.

The Courts have interpreted this requirement strictly recently writing, “An emergency is, by its very nature, a sudden, unexpected onset of a serious condition. *See The American Heritage Dictionary* 448 (2nd College ed.1982) (emergency defined as “[a]n unexpected situation or sudden occurrence of a serious and urgent nature that demands immediate action”); *Black's Law Dictionary* 361 (6th ed.1991) (defining emergency as “[a] sudden unexpected happening; an unforeseen occurrence or condition; ... a sudden or unexpected occasion for action”).” [SC Supreme Court Case No. 379 S.C. 160, 666 S.E.2d 236] Within that decision, the supreme Court quoted another decision when the Court wrote, “The court stated that “[t]he purported emergency stemmed from the District's decision to terminate its contract with [the original contractor] for the District's own ‘convenience.’ That event was not a ‘sudden, unexpected occurrence’ posing a clear and imminent danger requiring prompt action to protect life, health, property, or essential public services.” *See also [Marshall v. Pasadena Unified Sch. Dist.](#), 119 Cal.App.4th 1241, 15 Cal.Rptr.3d 344 (2004).*

Certainly, FMU required transportation services for its athletic teams. However, the basis of this emergency is hardly sufficient under the Court's scrutiny.

DETERMINATION

As noted in CPO Decision No. 2009-129, FMU's BVB-2022 was beset with multiple, serious violations of the Code committed by FMU officials. Again, with RFP-2036 and the emergency procurement, the CPO finds various violations of the Code. Therefore, the protest of Green's is granted. FMU's solicitation RFP-2036 is hereby canceled. The emergency contract is hereby canceled. FMU is ordered to fulfill its immediate, short-term transportation needs in accordance with the Procurement Code, including limiting it to the emergency situation and soliciting the as much competition as practicable. As for the original solicitation, which is still pending, the CPO directs that FMU close that solicitation in accordance with the Code.

This office has solicited transportation services for years using invitations for bids, the preferred source selection method of the Code. The CPO believes it is the appropriate source selection method here. At least under the best value bid processed by FMU the Code maintained some reasonable consideration for cost to the taxpayers at 60% of the evaluation. FMU's decision to re-solicit transportation services and relegate its consideration of cost to a mere 15% should offend the taxpayers of the State of South Carolina. As a matter of policy, it takes extraordinary circumstances for this office to approve weighting costs so low.

Prior to award of any contract, the Code requires the procurement officer determine the selected offeror responsible. The Code defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(6)] The

evaluation factors selected for evaluation by FMU could easily be determined by a thorough determination of responsibility. Instead, rather than demand a reasonable number of buses, drivers, and support personnel in an invitation for bids and then exercise its statutory right to determine the responsibility of the lowest bidder, FMU has chosen to utilize evaluation factors that emphasize contractor size rather than the sufficiency of a bidder's business to perform the transportation services required.

The CPO has not completed a determination of responsibility of Green's. However, after two hearings, the CPO has heard no justification why Green's would not be a responsible bidder. Under these evaluation criteria, however, Green's will continue to lose to transportation companies that possess resources in excess of those necessary to satisfy the requirements of the contract.

Green's concludes its letter writing, "FMU has disregarded its obligations under the SC Procurement Code at every turn and has demonstrated not only that it has an improper preference to award the services to Lancaster irrespective of the cost, but that FMU is willing to manipulate the procurement process in order to accomplish that goal. Every week, Greens Travel Coach's injury increases as FMU illegally awards additional charter services to Lancaster."

The sequence of events in this procurement certainly call FMU's intentions into question. First, FMU processes the procurement as a best value bid, a source selection method that allows for consideration of factors other than cost, but maintains cost as the predominant consideration for award. On August 3, 2009, FMU opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Green's	\$61,096
Lancaster	81,512
Travel Tours Unlimited	91,307

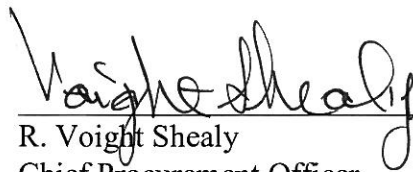
Green's offered the lowest bid by \$20,416 or 25% lower than Lancaster.

In CPO Decision no. 2009-129, the CPO took exception with FMU's decision to use a best value bid and found numerous violations of law in FMU's processing of the procurement. The CPO wrote, "The CPO finds that FMU's written determination for using a best value bid fails to meet the statutory requirement. In addition, FMU's primary concern – the low bidder may not have adequate resources to perform the transportation services – could have just as easily been accomplished through a thorough determination of responsibility by FMU prior to award" and remanded the matter to FMU recommending a resolicitation.

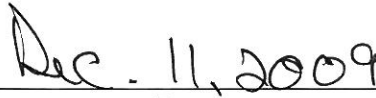
FMU chose to resolicit, but chose the second time to use a request for proposals; a curious decision in light of the Code's expressed preference for invitations for bids. In the evaluation factors chosen for the RFP, FMU relegated cost to a mere 15% of the overall evaluation factors, effectively eliminating cost from being a factor in the award.

In the interim, FMU declared an emergency procurement for an entire semester and awarded a contract to Lancaster with no competition whatsoever.

The CPO takes the opportunity to remind those involved in the procurement process that a stated purpose of the Procurement Code is "to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement." Surely FMU has failed in this regard. Therefore, the CPO directs FMU to cancel the RFP and re-solicit its requirements for transportation services for its athletic teams in strict accordance with the Code, which should be processed as an invitation for bids.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



LAQUIERE LAW FIRM, LLC

October 2, 2009

Via Facsimile (1-803-737-0639) Email (protestose@mmo.state.sc.us) and US Mail

R. Voight Shealy
Chief Procurement Officer for Supplies and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Protest
Cancellation of Solicitation (BVB-2022)
and Issuance of Request for Proposals (RFP-2036)

Francis Marion University – Charter Bus Services for Athletic Teams 2009-2010

Greens Travel Coach, LLC
vs
Francis Marion University

Case Name: Greens Travel Coach (Francis Marion Transportation Protest)
Our File No: 090115

Dear Sir:

This firm represents Greens Travel Coach, LLC with respect to all matters relating to the procurement of Charter Bus Services for Francis Marion University. Please accept this letter as Greens Travel Coach's Notice of Protest pursuant to S.C. Code 11-35-4210 of the following:

1. Francis Marion University's failure to award solicitation BVB-2002 to Greens Travel Coach, LLC as the lowest responsive and responsible bidder as is required by the SC Procurement Code;
2. Francis Marion University's cancellation of solicitation BVB-2002 in violation of the terms of the SC Procurement Code;
3. Francis Marion University's issuance of Request for Proposals RFP-2036 in violation of the terms of the SC Procurement Code;
4. Even if issuance of RFP-2036 is authorized under the Code, the terms of RFP-2036 violate the SC Procurement Code;
5. Francis Marion University's awarding the fall Charter Bus Services to Lancaster after the CPO vacated the award of BVB-2022 to Lancaster is in violation of the SC Procurement Code;

On September 8, 2009, the CPO posted its decision in Protest Case No. 2009-129 captioned Greens Travel Coach v Francis Marion University relating to BVB-2022, a best value procurement of charter bus services for the transportation of athletic teams for the 2009 – 2010 academic year.

Laquiere Law Firm, LLC
P.O. Box 30848 – Charleston, SC 29417
3674 Old Charleston Hwy, Johns Island, SC 29455

Phone (843) 556-2958
Fax (843) 576-0249
eric@laqlaw.com

62

1) Citing multiple bases for his decision, the CPO vacated the award to Lancaster Tours. One such basis was that Francis Marion University (FMU) made a mathematical error in calculating its rankings and that Greens Travel Coach was actually the highest rated offeror. Following this decision, the Code requires that FMU evaluate the highest rated offeror, i.e. Greens Travel Coach, for responsiveness and responsibility, and award the contract to Greens if it meets those standards. This protest is timely because it was made within 10 days of FMU taking any action with respect to the decision issued by the CPO.

2) FMU never cancelled solicitation BVB-2002 pursuant to the procedures required by the SC Procurement Code. Instead, FMU simply left the procurement stagnant and issued a new RFP for the same services, RFP-2036. This re-solicitation constitutes constructive cancellation of the original procurement, BVB-2002; which was done in contravention of the requirements of the SC Procurement Code. Thus, the cancellation is ineffective. This protest is timely because it was filed within 15 days (actually within 10 days) of the notice of the constructive cancellation.

3) FMU's issuance of RFP-2036 is in violation of the terms of the Procurement Code in that, among other things, BVB-2002 (procuring the same services) was never cancelled or was cancelled in violation of the requirements of the Code. This protest is timely because it was made within 15 days of the posting of the notice of the invitation for proposals.

4) The specifics of FMU's re-bid of bus charter services violates the Code. FMU's written determinations do not meet Code requirements, its weighting of bid considerations are arbitrary if not outright fraudulent, and the entire solicitation is organized in such a manner as to completely avoid the requirements, purposes, and policies of the Code and simply award the contract for services to Lancaster, at the expense of a 25% increase in cost to taxpayers.

5) After the CPO issued its decision vacating the award to Lancaster, FMU has awarded all of the bus charter services to date to Lancaster, piecemeal. This is in direct contradiction of the September 8, 2009 decision of the CPO, is in derogation of the rights of Greens Travel Coach as the successful protestor, and is an unlawful waste of taxpayer funds. FMU did not satisfy the requirements of the Code with respect to an "emergency procurement" for these services, nor did FMU follow the unappealed decision of the CPO. As a result, these contracts are in violation of the law.

The underlying purposes and policies of the South Carolina Consolidated Procurement Code, as expressed in SC Code Ann. § 11-35-20, include:

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement; and

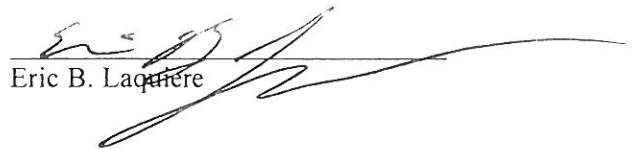
(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process.

FMU has disregarded its obligations under the SC Procurement Code at every turn and has demonstrated not only that it has an improper preference to award the services to Lancaster irrespective of the cost, but that FMU is willing to manipulate the procurement process in order to

accomplish that goal. Every week, Greens Travel Coach's injury increases as FMU illegally awards additional charter services to Lancaster. On behalf of Greens Travel, I respectfully request that the CPO schedule this for a hearing at the earliest possible time.

Sincerely,

LAQUIERE LAW FIRM, LLC


Eric B. Laquiere

EBL /jm

EL



LAQUIERE LAW FIRM, LLC

October 7, 2009

Via Facsimile (1-803-737-0639) Email (protestose@mmo.state.sc.us) and US Mail

R. Voight Shealy
Chief Procurement Officer for Supplies and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Protest
Cancellation of Solicitation (BVB-2002)
and Issuance of Request for Proposals (RFP-2036)

Francis Marion University – Charter Bus Services for Athletic Teams 2009-2010

Greens Travel Coach, LLC
vs
Francis Marion University

Case Name: Greens Travel Coach (Francis Marion Transportation Protest)
Our File No: 090115

Dear Sir:

After filing the above-captioned protest on behalf of Greens Travel Coach, LLC, I realized that we made a typographical error in paragraph number 1 on page 1. Because solicitation BVB-2002 was a Best Value Bid rather than a competitive sealed bid, paragraph 1 should have stated that Greens Travel Coach was the highest rated responsive and responsible offeror rather than stating that Greens Travel Coach was the lowest responsive and responsible bidder. As such, I would like to amend paragraph 1 to read as follows:

1. Francis Marion University's failure to award solicitation BVB-2002 to Greens Travel Coach, LLC as the highest rated responsive and responsible offeror as is required by the SC Procurement Code.


In addition to this change, I would like to clarify that the Best Value Bid solicitation number should read BVB-2002, not BVB-2022 as the caption and second paragraph state.

EL

I apologize for any confusion. I look forward to hearing from you in the near future.

Sincerely,

LAQUIERE LAW FIRM, LLC


Eric B. Laquiere

EBL/jv
(cc: Antonio Green via Facsimile 843-753-3523)

EL



LAQUIERE LAW FIRM, LLC

October 7, 2009

Via Facsimile (1-803-737-0639) Email (protestose@mmo.state.sc.us) and US Mail

R. Voight Shealy
Chief Procurement Officer for Supplies and Services
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Protest
Cancellation of Solicitation (BVB-2002)
and Issuance of Request for Proposals (RFP-2036)

Francis Marion University – Charter Bus Services for Athletic Teams 2009-2010

Greens Travel Coach, LLC
vs
Francis Marion University

Case Name: Greens Travel Coach (Francis Marion Transportation Protest)
Our File No: 090115

Dear Sir:

I am in receipt of the Notice for a Hearing on the above referenced matter which is scheduled for November 6. On my client's behalf I am requesting that the Materials Management Office consider scheduling an expedited hearing.

The original solicitation was conducted in July 2009 for services to begin on Aug 27. My client filed its protest on August 10 and was successful in its protest, however, Francis Marion has continued to award the services to Lancaster. If Green's is not granted a hearing until November 6, it will suffer additional injury because Lancaster will continue to be awarded illegal bus coach contracts until the CPO issues its decision on or about Nov. 16. This will result in only two (2) of the original nineteen (19) fall bus coach service contracts not being awarded to Lancaster in violation of the CPO's order dated September 10. This equates to a loss of \$33,374.00 in bus coach contracts to Green and an even greater windfall to Lancaster (because Lancaster's price per trip is higher) resulting from Francis Marion's illegal award of bus coach contracts during the pendency of this protest and Green's previous protest. Even more disturbing

is the fact that Green will lose \$14,121.00 in bus coach contracts during the period of October 2 through November 16, which is the period of time since this second (2nd) protest was filed seeking enforcement of the first CPO decision.

For the foregoing reasons, I urge the MMO to schedule an expedited hearing if it is in any way possible.

Sincerely,

LAQUIERE LAW FIRM, LLC


Eric B. Laquiere

EBL/jv

cc: Antonio Green via Facsimile 843-753-3523

Elizabeth Crum via email lcum@mcnair.net

October 28, 2009

via Email

Mr. Voight Shealy, Chief Procurement Officer
Office of General Services
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RECEIVED
INSURANCE FRAUD DIVISION
S.C. ATTORNEY GENERAL

DATE _____

M. Elizabeth Crum

elcrum@mcnair.net
T (803) 799-9600
F (803) 753-3219

RE: In the Matter of Protest of: Green's Travel Coach, LLC
Francis Marion University – Charter bus Services for Athletic Teams
BVB-2022 and RFP-2036 (Case No. 2009-138)

Dear Mr. Shealy:

On behalf of Francis Marion University ("FMU"), enclosed please find a Motion to Dismiss and Memorandum in Support in reference to the above-captioned matter. By copy of this letter, I am serving all parties of record.

This matter is currently scheduled to be heard by you on Friday, November 6, 2009. We would ask that you hold a hearing on our Motion prior to next Friday's hearing. If convenient to you and Mr. Laquiere, we are amenable to a telephonic hearing. Also, in the event this case is not disposed of through the Motion, we would ask that the hearing be re-scheduled. Mr. John J. Kispert, Vice President of Business Affairs for FMU, must attend the Board of Trustees' meeting for FMU on November 6th. As the chief financial officer for the University, it is critical that he be allowed to attend that meeting and to be present at the protest hearing.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely, -


M. Elizabeth Crum

Enclosures

cc: Eric B. Laquiere, Esq.
Molly Crum, Esq.
Mr. John Stevens

McNair Law Firm, P.A.
The Tower at 1301 Gervais
1301 Gervais Street, 11th Floor
Columbia, SC 29201

Mailing Address
P.O. Box 11390
Columbia, SC 29211

mcnair.net

BEFORE THE CHIEF PROCUREMENT OFFICER
Solicitation No. RFP-2036
Case Number 2009-138

IN THE MATTER OF PROTEST OF:

Greens Travel Coach, LLC)	MOTION TO DISMISS AND
BVB No. BVB-2022¹)	MEMORANDUM IN SUPPORT
Transportation for Athletic Teams)	
_____)	

On behalf of our client, Francis Marion University ("FMU"), we move to dismiss the protest of Greens² [sic] Travel Coach, LLC ("Greens")³ on the following grounds:

1. Grounds 1, 2, 3 and 5 are not timely appealed;
2. Grounds 2, 3, 4 and 5 fail to state a protest upon which relief can be granted because the grounds are overly vague or broad in derogation of S.C. Code Ann. § 11-35-4210(2)(b); and
3. Greens is collaterally estopped from raising any issues regarding BVB-2022.

For the reasons set forth below, the protest should be dismissed in its entirety.

PROTEST GROUNDS

1. Francis Marion University's failure to award solicitation BVB-2002 [sic] to Greens Travel Coach, LLC as the highest rated responsive and responsible offeror as is required by the SC Procurement Code;
2. Francis Marion University's cancellation of solicitation BVB-2002 [sic] in violation of the terms of the SC Procurement Code;

¹The October 2, 2009, protest letter states that it is appealing both the cancellation of BVB-2022 (or 2002) and issuance of RFP-2036. While the hearing notice only listed the protest of BVB-2022, we are assuming that the protest hearing on November 6, 2009 will also address the protest issues directed at RFP-2036, and this Motion is applicable to the issues directed at RFP-2036.

² On information and belief, Greens is the same entity as "Green's Travel Coach" as listed in Case No. 2009-129.

³ The October 2, 2009, protest letter identifies BVB-2022 as the best value bid cancellation it is protesting in its "Re" line. However, in the body of its October 2d letter, Greens repeatedly refers to the BVB as number 2002. In its October 7, 2009, letter, Greens [sic] stated that the October 2, 2009, letter was in error and the BVB was 2002 and not 2022, and asked that the October 2, 2009, letter be amended to reflect that Greens was protesting BVB-2002. However, the bid number is actually BVB-2022, as is indicated on the decision of the Chief Procurement Officer issued on September 8, 2009, in that proceeding.

3. Francis Marion University's issuance of Request for Proposals RFP-2036 in violation of the terms of the SC Procurement Code;
4. Even if issuance of RFP-2036 is authorized under the Code, the terms of RFP-2036 violate the SC Procurement Code; and
5. Francis Marion University's awarding the fall Charter Bus Services to Lancaster after the CPO vacated the award of BVB-2022 [sic] to Lancaster in violation of the SC Procurement Code.

MEMORANDUM IN SUPPORT

1. Grounds 1, 2, 3 and 5 Are Not Timely Appealed. Each of these grounds arises from Greens' protest which has already been decided by the Chief Procurement Officer's ("CPO") Decision in Case No. 2009-129, In the Matter of Protest of: Green's Travel Coach⁴, Francis Marion University BVB No. BVB-2022 Transportation for Athletic Teams (September 8, 2009) ("Green's Travel Coach"). In that case, Greens successfully protested FMU's award to Lancaster Tours ("Lancaster") of Best Value Bid No. BVB-2022 for motor coach transportation services for its athletic teams. The CPO's remedy provided in the Decision states: "For all the reasons stated above, the protest is granted. The award to Lancaster is vacated. The procurement is remanded back to FMU for a proper determination of award, or better a resolicitation." Green's Travel Coach, Case No. 2009-129, p. 8 (emphasis added).

Greens was fully aware that the CPO's Decision in that proceeding gave FMU the choice either to make a proper determination of award or, even better, to resolicit the services. Greens could have appealed the CPO's resolicitation remedy to the South Carolina Procurement Review Panel ("the Panel") pursuant to S.C. Code Ann. § 11-35-4210(6) and § 11-35-4410 (Supp. 2009). However, Greens did not appeal and, on

⁴ Greens and Green's Travel Coach are one and the same entity. In the October 2, 2009, Protest Letter, the apostrophe was left out of Greens.

September 19, 2009, the Decision was final and binding on Greens and FMU. FMU chose the "better" remedy ordered by the CPO and re-solicited the Transportation Services through RFP-2036. Notably, Greens admitted in its letter that the CPO's decision was not appealed. Protest Letter, October 2, 2009, p. 2, para. 5 ("...nor did FMU follow the *unappealed* decision of the CPO.") (emphasis added). Therefore, Greens has failed to protest timely these grounds.

2. Grounds 2, 3, 4 and 5 Fail to State a Protest Upon Which Relief May Be Granted. Assuming that Greens' protests were timely raised, they should nevertheless be dismissed because each fails to state a cause of action upon which relief can be granted. With respect to Protest Nos. 2 and 3, Greens allegations are essentially the same: 1) FMU did not cancel BVB-2002 [sic] in accordance with the requirements of the S.C. Procurement Code; and 2) the re-solicitation of RFP-2036 was illegal because BVB-2002 [sic] was not cancelled or cancelled in violation of the Procurement Code.

23 S.C. Code Regs. 19-445-2085(C)⁵ provides a litany of reasons upon which to cancel an award or contract, prior to performance, and either re-award or issue a new solicitation. The regulation provides, in pertinent part:

⁵ This regulatory provision provides for cancellation of awards upon written determination by the CPO:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;
- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that: ...

(7) Administrative error of the purchasing agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

23 S.C. Code Regs. 19-445.2085(C)(1), (7) and (8) (Supp. 2009) (emphasis added). As even a cursory review of Green's Travel Coach reveals, there were administrative errors by the purchasing agency discovered prior to performance. Further, the Decision even suggests that the best interest of the State would be carried out by a re-solicitation.

Greens' Protest states first that FMU never cancelled BVB-2002 [sic] and then states that the resolicitation constitutes a "constructive cancellation" of the BVB. BVB-2022 was cancelled when the Green's Travel Coach Decision was issued. The CPO's Decision constitutes the CPO's written determination in compliance with the requirements of 23 S.C. Code Regs. 19-445.2085(C) (Supp. 2009). Cf. In Re: Protest of Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield; appeal by Value Options, Magellan Behavioral Health & Blue Cross and Blue Shield, Case No. 2001-7, Issue 3 (2001). BVB-2022 was cancelled in accordance with the requirements of the Procurement Code and Reg. 19-445.2085(C) (Supp. 2009). Thus, Protest Nos. 2 and 3 do not state a cause of action upon which relief can be granted.

(6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

(7) Administrative error of the purchasing agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

Regarding Protest No. 4, Greens contends that the "specifics" of RFP-2036 are in violation of the Code. The Procurement Officer has discretionary authority to determine the best method of solicitation. See S.C. Code Ann. 11-35-2410(A) (Supp. 2009); see also In re: Protest of S.C. Ass'n of the Deaf, Case No. 2008-2 ("While not essential to its decision, the Panel notes that the CPO spent a considerable amount of time in his decision discussing the State's prerogative in determining which source selection method to use in its various solicitations. *The Panel agrees with the CPO that the decision to use an RFP rests in the sole discretion of the purchasing agency.*") (emphasis added). Moreover, to the extent that Greens is attempting to argue that the "organization" of the RFP was violative of the Code, we move to dismiss for failure to state a cause of action upon which relief can be granted. Neither the procurement statutes nor their accompanying regulations include such a provision or requirement.

As best FMU can determine, the gist of Protest Ground No. 5 appears to be that FMU did not follow the CPO's earlier Decision and, further, did not comply with emergency procurement procedures in its award of certain bus charter services to another vendor. S.C. Code Ann. § 11-35-1570 permits the CPO or head of the purchasing agency, or a designee of either office, to obtain emergency procurement services where it is determined that there is an "immediate threat to public health, welfare, critical economy and efficiency, or safety." The relevant procurement regulation provides that the "existence of such conditions must create an immediate and serious need for supplies [and], services ...that cannot be met through normal procurement methods." 23 S.C. Code Regs. 19-445.2110(B).

In this case, an authorized designee of FMU made the required written determination of emergency, attached hereto as Exhibit A, on August 23, 2009, and stated that transportation services for the athletic teams were needed as early as August 27, 2009. In this case the safety and welfare of the FMU student athletes being transported to athletic events is of paramount concern to FMU. FMU's selection of the particular vendor is based upon its status as the *current* vendor of the services at issue. As such, FMU properly complied with all statutory and regulatory provisions related to emergency procurement services. Obviously, there was no time to procure the services through normal procurement methods. FMU clearly followed the requirements of § 11-35-1570. Protest No. 5 fails to state a ground upon which relief can be granted.

The BVB-2022 was suspended after Greens filed a protest and, in recognition of the upcoming university athletic season, an emergency hearing was conducted before the CPO on August 27, 2009, with its decision vacating the award issued on September 8, 2009 – after the school year had already begun and after such services were needed.

To the extent that Greens argues that the emergency procurement “is in direct contradiction of the September 8, 2009 decision of the CPO,” the emergency procurement was made prior to the decision and no timely appeal was made of the emergency procurement. We are uncertain as to Greens’ allegation that the bus charter services have been awarded “piecemeal.” A single award for three (3) months was made to Lancaster, the then-current vendor. See Exhibit A, Justification for Emergency Procurement.

3. Grounds 3, 4 and 5 Are Overly Vague or Broad. FMU moves to dismiss these protest grounds on the basis that each does not “set forth ... the grounds of the

protest ... with enough particularity to give notice of the issues to be decided," as required by South Carolina law. S.C. Code Ann. § 11-35-4210(2)(b). In its Protest Ground No. 3, Greens asserts that FMU's issuance of RFP-2036 is in violation of the South Carolina Procurement Code ("the Code") because, "among other things," BVB-2002 [sic] was never cancelled or was cancelled in violation of the Code. Greens fails to cite to any particular provision in the Code to support its contention and, further, to the extent that Greens alleges that FMU's issuance of the RFP violated "other things," FMU moves to dismiss as vague in contravention of § 11-35-4210(2).

With respect to Protest No. 4, Greens, as first mentioned above, fails to point to any provision in the Code to support its contention, merely stating that FMU's re-issuance did not meet Code "requirements" and was "arbitrary" and "fraudulent." Protest Letter of October 2, 2009, p. 2, para. 4. Greens further stated that the solicitation was "organized in such a manner" to avoid the Code's "requirements, purposes, and policies." Id. It is unclear as to what Greens is trying to assert. On page 1, paragraph 4 of its Protest Letter, it contends that the "terms" of the RFP-2036 were in violation of the Code. To the extent that Greens is attempting to contend that *all* "terms" of the RFP are violative of the Code, FMU hereby moves to dismiss as overly vague and broad because such language lacks specificity regarding the precise matters subject to the protest, as required by S.C. Code Ann. § 11-35-4210(2).

As discussed above, Protest No. 5 should be dismissed for failure to state a cause of action upon which relief can be granted. This protest ground merely expresses conclusory allegations concerning the award of necessary services while the solicitation, extended through this protest, is pending. In numerous cases, including In

re: Protest of NBS Imaging Sys., Inc., Case No. 1993-16, the Panel has held that references to unspecified or generalized defects concerning entire sections of a proposal do not meet the test of particularity required by the statute. See, e.g., In Re: Protest of Transp. Mgmt. Services, Inc., Appeal by Transp. Mgmt. Services, Inc., Case No. 2000-2. Nevertheless, this protest ground fails to provide any specificity and each of these bare allegations does not provide sufficient detail to give notice as to how FMU's actions "contradicted" the CPO's decision or failed to "satisfy" the Code's requirements.

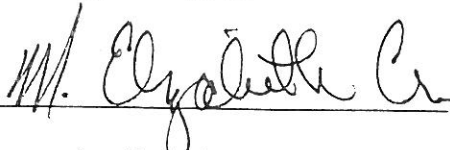
4. Collateral Estoppel—Grounds 1, 2, 3 and 5. As discussed above in Section 1 of this Memorandum, each of these grounds arises from Greens' protest which was decided in the CPO's earlier Decision in Case No. 2009-129, In the Matter of Protest of: Green's Travel Coach, Francis Marion University BVB No. BVB-2022 Transportation for Athletic Teams (September 8, 2009) ("Green's Travel Coach"). The remedy provided in the Decision states: "For all the reasons stated above, the protest is granted. The award to Lancaster is vacated. The procurement is remanded back to FMU for a proper determination of award, *or better a resolicitation.*" Green's Travel Coach, Case No. 2009-129, p. 8 (emphasis added). Greens knew that the CPO's Decision gave FMU the choice either to make a proper determination of award or, even better, to resolicit the services. Greens could have appealed the CPO's remedy to the Panel pursuant to S.C. Code Ann. § 11-35-4210(6) and § 11-35-4410 (Supp. 2009). However, Greens did not appeal and, on September 19, 2009, the Decision was final and binding on Greens and FMU. FMU chose the "better" remedy ordered by the CPO and resolicited the Transportation Services through RFP-2036.

The doctrine of collateral estoppel holds that “[1] when an issue of fact or law is actually litigated and determined by a valid and final judgment, and [2] the determination is essential to the judgment, [3] the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Carman v. S.C. Alcoholic Beverage Control Comm’n, 317 S.C. 1, 9, 451 S.E. 2d 383, 386 (1994) (citing S.C. Prop. and Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E. 2d 625 (1991)). In situations where the plaintiff – here, the protestant – brings the second action under a different claim or demand, collateral estoppel applies if “all of the facts necessary to prove the essential elements in (the second) action would be essentially the same as those in the first action.” Jones v. Folly Beach, 326 S.C. 360, 367, 483 S.E. 2d 770, 774 (Ct. App. 1997) (citing Dunlap v. Travelers, Ins. Co., 223 S.C. 150, 157, 74 S.E. 2d 828, 831 (1953)). When considering the defensive use of collateral estoppel, it is important to determine, “whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” Pye v. Aycock, 325 S.C. 426, 436, 480 S.E. 2d 455, 460 (Ct. App. 1997) (quoting Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 390-91, 287 S.E. 2d 495, 496 (1982)). In failing to appeal timely the remedy of resolicitation, Greens abandoned its protest and cannot now have a “second bite at the apple” to get the remedy it wanted in the first protest.

CONCLUSION

Based upon the foregoing reasons, Francis Marion University respectfully requests that the protest of Greens Travel Coach, LLC, be dismissed in its entirety.

M. Elizabeth Crum
Sue-Ann Gerald Shannon
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
Telephone: (803) 799-9800
Facsimile: (803) 753-3219
lcrum@mcnair.net
sshannon@mcnair.net

By: 
Attorneys for Francis Marion University

October 28, 2009
Columbia, South Carolina.

**JUSTIFICATION FOR
EMERGENCY PROCUREMENT**

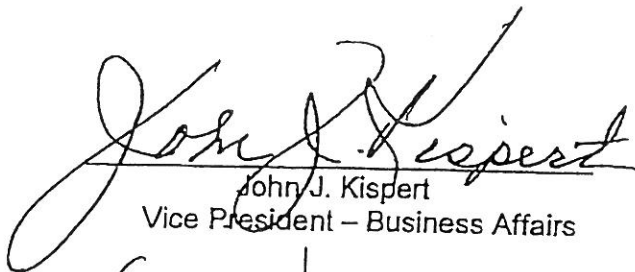
Based on the following determination, the proposed procurement action described below is being procured pursuant to the authority of Section 11-35-1570 of the South Carolina Procurement Code and 19-445.2110 of the Rules and Regulations, 1976 South Carolina Code of Laws.


This governmental body proposes to procure: Furnish Transportation for Athletics Teams

as an emergency procurement from: Lancaster Tours, Inc

The basis for selection of this particular vendor is: Francis Marion University is issuing an emergency procurement during the protest of BVB-2022. An emergency hearing is scheduled for Thursday, August 27, 2009 at 9:00am. The current vendor has agreed to be content with the contract for three months. This emergency procurement is due to the fact that the Francis Marion University athletic teams are to start to travel on August 27, 2009.

Date: 08/23/2009


John J. Kispert
Vice President – Business Affairs


Velma Simmons
Director of Purchasing

- Notes: (1) Enter description of goods or services to be procured.
(2) Enter name and address of contractor.
(3) Enter the basis for emergency procurement.
(4) Enter the basis for selection.

**THE DRUG FREE WORKPLACE ACT APPLIES TO ALL EMERGENCY PROCUREMENTS
OF \$50,000 OR GREATER.**

P.O:

Amount: \$47,152.00

VIII. Attachment A Itinerary / Bid Schedule

Conference tournaments. The destination anticipates the farthest possible location which may be determined as the site for tournament play. That destination should be determined four (4) days prior to the departure date. Should the destination change, the university will notify the carrier immediately and would anticipate that the cost of the trip would be negotiated down to prevailing market rates. The university would reserve the right to contract with an alternate source if the reduction rate offered is unacceptable to the university. If a team loses, they will return immediately; indicate deduction for returning early. If inclement weather, the team may have to stay an additional night; indicate cost for additional night(s). Direct any inquiries concerning these trips to Mr. Murray Hartzler at 843.661.1237

Charter Bus Bid 2008-09

DESTINATION:	SPORT/PASSENGERS:	DEPARTURE/RETURNING:	OVERNIGHT:	BID AMOUNT
1) Jefferson City, TN	Volleyball	8/27 1 pm 8/30 1 am	YES (2)	3433
2) Kennesaw, GA & Birmingham, AL	W Soccer/24	8/28 10 am - 8/30 12 am	YES (2)	3828
3) Anderson, SC	M Soccer/24	9/1 1 pm - 9/2 1 am	NO	1183
4) Mars Hill, NC	M Soccer/24	9/12 12 pm - 9/13 2 am	NO	1985
5) Morrow, GA	M Soccer/24	9/19 8 am 9/20 3 am	NO	2248
6) Montevallo, AL	Volleyball	9/19 11 am - 9/21 1 am	YES (1)	3133
7) Lynchburg, VA & Rock Hill, SC	W Soccer/24	9/24 8 am - 9/25 11 pm	YES (1)	2630
8) Americus, GA	M Soccer/24	9/25 2 pm - 9/26 11 pm	YES (1)	2700
9) Greenwood, SC	M Soccer/24	9/30 1 pm - 10/1 1 am	NO	1119
10) Boiling Springs, NC	W Soccer/24	9/30 1 pm - 10/1 1 am	NO	1119
11) Richmond, KY	W Soccer/24	10/10 8 am - 12/12 1 am	YES (1)	3487
12) Greenwood, SC & Aiken, SC	Volleyball/15	10/16 1:30 pm - 10/17 9 pm	YES (1)	1888
13) Harrogate, TN	M Soccer/24	10/23 2 pm - 10/25 2 am	YES (1)	2825
14) St Augustine, FL	M Soccer/24	10/31 7 am - 11/1 5 am	NO	3668
15) Raleigh, NC	W Soccer/24	10/29 1 pm - 10/30 1 am	NO	1112
16) Savannah, GA & St Augustine, FL	Volleyball	11/6 12 pm - 11/8 4 am	YES (1)	2882
17) Melbourne, FL	M Basketball/20	11/14 11 am - 11/17 2 am	YES (2)	4086
18) Newport News, VA	M Basketball/20	12/17 10 am - 12/19 3 am	YES (1)	2709
19) Greenwood, SC	M & W Basketball/40	12/6 1 pm - 12/7 12 am	NO	1119
20) Milledgeville, GA & Montevallo, AL	M & W Basketball/40	1/28 1 pm - 1/31 3 am	YES (2)	4157

) BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:

CASE No. 2009 - 129

Green's Travel Coach

CERTIFICATE OF SERVICE

Francis Marion University
BVG No. BVB-2022
Transportation for Athletic Teams

I, Betty Y. Wheeler, do hereby certify that I have this date served one (1) copy of Francis Marion University's Motion to Dismiss and Memorandum in Support upon the following parties of record by causing said copies to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as follows

Eric B. Laquiere, Esquire
Laquiere Law Firm, LLC
P O Box 30848
Charleston, SC 29417

John R. Stevens
State Contracting Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201

Betty G. Wheeler

Betty X. Wheeler
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

October 28, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of:)

CASE No. 2009 - 129

Green's Travel Coach)

Francis Marion University)

POSTING DATE:

BVB No. BVB-2022)

September 8, 2009

Transportation for Athletic Teams)

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Green's Travel Coach (Green's). With this best value bid (BVB), Francis Marion University (FMU) attempts to procure motor coach transportation services for its athletic teams. In the letter, Green's protested FMU's intent to award to Lancaster Tours (Lancaster) alleging "our bid was the lowest bid" and "I was told (by FMU) that Lancaster was a larger company that could provide more coaches and more drivers."

In order to resolve the matter, the CPO conducted a hearing August 27, 2009. Appearing before the CPO were Green's, represented by Antonio and Lavender Green; Lancaster, represented by Frankie Sistare; and FMU, represented by Velma Simmons, Director of Purchasing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 20, 2009, FMU issued the BVB. [Ex. 1]
2. On August 3, 2009, FMU opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Green's	\$61,096
Lancaster	81,512
Travel Tours Unlimited [Ex. 9]	91,307

3. On August 4, 2009, FMU posted a notice of intent to award to Lancaster "Not to exceed \$250,000."
[Ex. 4]
4. On August 10, 2009, Green's protested to the CPO.

DETERMINATION

FMU processed the procurement as a best value bid. The Consolidated procurement Code authorizes the use of a best value bid. Its reads:

(1) Conditions for Use. When a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive best value bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the State. [11-35-1528]

FMU completed the required written determination justifying the use of a best value bid.

Velma Simmons wrote:

In selecting a contractor to provide transportation for the Athletic Department, it has been determined that factors other than price such as company capabilities and demonstrated abilities are critical to the award.

Factors of this nature can best be expressed and evaluated through the use of competitive best value bidding. The services to be provided may be bid by companies not having adequate resources to provide them. Safety is also of primary importance. A low bid solicitation would not be an effective method to determine which vendor is acceptable. It is felt that 40% evaluated criteria is sufficient and RFP would not be necessary. [Ex. 2]

The CPO finds that FMU's written determination for using a best value bid fails to meet the statutory requirement. In addition, FMU's primary concern – the low bidder may not have adequate resources to perform the transportation services – could have just as easily been accomplished through a thorough determination of responsibility by FMU prior to award.

The CPO finds numerous statutory violations in the determination of award by FMU.

FMU requested fax or email bids in violation of 11-35-1520 that requires sealed bidding for all solicitations greater than \$50,000

The evaluation criteria is poorly defined and spread across the length of the BVB, not located in one clearly delineated section of the BVB, as follows:

- “the university has established that quality of fleet and available resources are critical factors in award” [Ex. 1, p. 2, Scope of Solicitation]
- “PRICING IS VALUED AT 60% OF AWARD.” [Ex. 1, p. 5, Requirement] [Emphasis theirs]
- Best Value Bid Award Criteria
 - Give a brief overview of your company, date of incorporation, and number of employees at the facility that would service this account.
 - Please break out that number by function (i.e. drivers, mechanics, administrative, support personnel).
 - List the number of 42 passenger buses in your fleet that would be available to service this contract and the date of their manufacture.

- List your USDOT certification number.
- List the number of full time vs. part time drivers you employ.
- Submit any other information that you believe would demonstrate that your company would be the best choice to provide this service to the university.
- YOUR RESPONSES TO THE QUESTIONS ABOVE WILL BE EVALUATED BY UNIVERSITY PERSONNEL AS 40% OF THE AWARD CRITERIA.
- [Ex. 1, p. 6]

The evaluation criteria do not announce the weight (importance) of each evaluation factor in accordance with 11-35-1528(5), which reads, “The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor.” Price was weighted at 60%, as required by law, but rather than announce the weight of each of the remaining evaluation criterion, FMU lumped them together as 40% of the award, in violation of the Code, which reads, “The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor.” [11-35-1528] [Emphasis mine]

Rather than scoring proposals on a 100 point numerical basis, as has been the practice in South Carolina state government for decades, and in conformance with the evaluation criteria, the evaluators merely ranked the offers 1-3 with no apparent consideration for the stated importance of each evaluation criterion. [Ex. 8] The Code allows ranking of a best value bid, but requires that a ranking must follow evaluation of the award criteria. It reads, “Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the

best value bid.” [11-35-1528(7)] [Emphasis mine] FMU skipped the evaluation and went straight to the ranking in violation of law.

The evaluation was not conducted in accordance with the announced weighting of the evaluation criteria as stated in the BVB in violation of SC Code section 11-35-1528, which reads: “Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the best value bid.” Clearly, FMU did not consider the weight assigned the evaluation factors, particularly price, in its ranking of bidders. Instead, there is no evidence that the evaluators considered price at all.

The ranking completed by FMU completely ignored the stated evaluation criteria and the weight assigned each criterion. Instead, they chose the bidder they liked best.

After the protest was filed, not before award, FMU fabricated evaluation score sheets in the conventional fashion utilized by the state.¹ The scores were as follows:

<u>Offeror</u>	<u>Evaluator</u>	<u>Score</u>
○ Green’s	Michael	88
	○ Murray	88
	○ Velma	<u>84</u>
• Total		<u>260</u>
○ Lancaster	Michael	92
	○ Murray	92

¹ Velma Simmons acknowledged during the hearing that the evaluation score sheets were not prepared until after the protest was filed.

○ Velma 92

• Total 276

▪ [Ex. 5]

○ Scores for price were proportioned mathematically as follows:

▪ Green's 60 per evaluator

▪ Lancaster 52 per evaluator

An analysis of the prices offered by Green's and Lancaster reveals that even in the score sheets fabricated after the protest was filed, the mathematical apportionment of points for cost was made erroneously. The correct scores for cost should have been as follows:

○ Green's \$61,096 60 per evaluator

○ Lancaster \$82,512 44 per evaluator ($\$61,096/\$82,512 = 74\%$,
60 points x 74% = 44.4)

○ The correct scores should have been:

○ Offeror Evaluator Score

○ Green's Michael 88

○ Murray 88

○ Velma 84

• Total 260

○ Lancaster Michael 84.4 (44.4 + 24)

○ Murray 84.4 (44.4 + 40)

○ Velma 84.4 (44.4 + 40)

• Total 253.2

○ As the highest scoring offeror, Green's should have won!

No written determination and finding of award was prepared in violation of SC Code section 11-35-1528, which reads, "Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit." According to Ms. Simmons, the determination of award offered as Ex. 5 was not prepared until after the protest was filed.

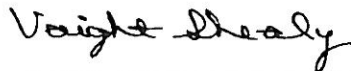
FMU felt that Green's was nonresponsive in that Green's did provide the required information regarding its number of drivers and buses. The Code defines a bidder's conformance with the requirements of a solicitation as responsiveness, which means "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." [11-35-1410(7)] She noted that Green's wrote in its bid, that it possessed five buses and wrote "Our buses feature 20 air ride." [Ex. 11, p. 3, Equipment] Green's testified that the statement "20 air ride" refers to the suspension of its buses, not their capacity. Without seeking a clarification of Green's statement, FMU considered Green's nonresponsive. However, FMU evaluated Green's bid and no determination or memo for the file was prepared to document any deficiencies in Green's bid.

According to Murray Hartzler, FMU's Director of Athletics, FMU has experienced some poor performance from transportation providers in the past from bidders who claimed to possess the resources to provide the transportation services, but failed in the performance of the contract. FMU expressed the opinion that Green's did not possess sufficient drivers, staff and motor coaches to perform the contract. However, FMU did not seek any additional information from Green's or complete a determination of non-responsibility, as required by SC Code 11-35-1810(2), which reads "A written determination of non-responsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board."

The CPO is sympathetic to FMU's plight in the past and to its desire to contract with a provider with adequate resources to perform the contract, but notes that the solicitation requires the contractor to provide buses capable of "transporting a minimum of 42 passengers" [Ex. 1, p. 5, IV. Requirements, Item 3] to transport FMU sports teams on 35 trips. However, all but 10 of those trips only require a single bus; the other 10 trips require two buses. According to Antonio Green, Green's possesses one 47 passenger bus, three 56 passenger buses, and one 25 passenger bus. The Code defines a responsible bidder as, "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(6)] As the BVB requires that the buses be at least 42 passenger, the 25 passenger bus cannot be considered, but on the surface, Green's four buses capable of transporting at least 42 people would seem sufficient.

FMU issued an intent to award for "not to exceed \$250,000", but Lancaster's bid was only \$82,512. Who knows where the estimate of \$250,000 was derived? For an award of \$82,512, the Code does not even require the issuance of an intent to award; a statement of award would have sufficed. Yet, FMU issued an intent to award.

For all the reasons stated above, the protest is granted. The award to Lancaster is vacated. The procurement is remanded back to FMU for a proper determination of award, or better, a resolicitation.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

September 8, 2009

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

RCVD MNO

AUG10 '09 MO 10:14AM

TO: CHIEF PROCUREMENT OFFICER

FROM: GREEN'S TRAVEL COACH, LLC

DATE: AUGUST 10, 2009

SUBJECT: FRANCIS MARION UNIVERSITY -BID -BVB 2022

Dear Chief Procurement Officer,

Green's Travel Coach would like to exercise the rights under section 11-35-4210 (Right To Protest) of The S.C. Consolidated Procurement Code. Green's Travel Coach was informed by Francis Marion University Procurement Office, Velma C. Simmons, that our bid of \$61,096.00 were the lowest bid compared to Lancaster Tours of a bid of \$70,000.00 It was explained to me that we did not receive the reward because the bid was not base only on price. I was told that Lancaster was a larger company that could provide more coaches and more drivers than my small minority own business. The bid requested a least a 42 passenger coach. Green's Travel Coach have 47 passenger coach and 56 passenger coaches. We have 5 full-time drivers and 2 part-time drivers. These are some of the examples I was told why we did not receive the bid. At any given time, the bid was only requiring 2 coaches on the same date. The rest of the bid was only requiring one. Why should this be grounds on ignore the lowest bid of a small minority company that can do the job. We feel that Green's Travel Coach bid was ignored because the bid was focus on large companies only. This is very unfair, because it does give small minority on company the chance to become large businesses. Green's Travel Coach have been in business going on 6 years. We have good references such as the Citadel, Burke High School, and State Farm. We can provide you with more references if needed.

Our DOT records have been clean since we have been in business. We strive in customer satisfaction, and we are good at what we do. Large company are not always the best company to go with. A small company can be more detail, more particular, and more precise in the things they do because of their size. The economy is slow. Being a small company, we have seen where large companies have been considered for jobs that there are not worthy of, and this is running the smaller company out of business. We will like you to take a deeper look on the way this bid was rewarded to Lancaster Tours, and the grounds that was considered in this choice.

Respectfully Submitted,

Antonio & Lavander Green
Green's Travel Coach, LLC
Manager/Owner
843-753-7325
Fax -843-753-3523
Email-agreen7732@aol.com